APPENDIX

BROWN-OLDS CASES IN THE COURTS OF APPEAL

I

Cases Where Reimbursement of Dues Was Refused

N. L. R. B. v. *Local Union No. 85, Sheet Metal Wkrs.' Int. Ass'n*, 274 F. 2d 344 (5th Cir. 1960).

The employer was not charged, but the union was found to have conducted an unlawful hiring hall arrangement under which union members were preferred in hiring. The court refused to enforce an order requiring reimbursement of dues to all present and former employees, because it could not be said that there was evidence (p. 346) "to show that any of the members of the Union would have declined to pay dues and surrendered their Union membership if Union membership had not been necessary in the procuring of employment". In effect, the court distinguished between mere "encouragement" and "coercion" and held that without evidence of coercion, reimbursement of dues becomes "punitive rather than compensatory".

Honolulu Star Bulletin, Ltd. v. *N. L. R. B.*, 274 F. 2d 567 (D. C. Cir. 1959).

The court refused to enforce a Board order which provided in part that the newspaper publisher[39] must reimburse

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[39]The ITU local was not a party to the proceedings because the charging parties filed only against the employer. Thus, the grave financial consequences of the Brown-Olds remedy may depend entirely upon the whimsical choice of the charging party as to the party against whom the charge will be filed.

all employees in its composing room who had paid dues and assessments to the ITU local. Said the court (p. 571):

> "Since we find that the contract was not illegal and was not a closed-shop agreement, the premise for the Board's ruling falls. The Board's finding that the payment of dues and assessments to the Union was made a condition of employment is without the slightest semblance of support in the record. This provision of the order, therefore, will not be enforced."

Local 357, Internat'l Bro. of Teamsters, etc. v. *N. L. R. B.*, 275 F. 2d 646 (D. C. Cir. 1960), No. 85 this Term.

The court refused to enforce, as against the employer and the union, the Board's reimbursement of dues order relating to "all casual employees", although it affirmed the Board's finding that the exclusive hiring arrangement was discriminatory and encouraged union membership in violation of the Act.

Building Material Teamsters, Local 282, etc. v. *N. L. R. B.*, 275 F. 2d 909 (2d Cir. 1960).

The court refused to enforce a reimbursement order against the union as well as the employer. The violation involved a clause in the contract requiring union membership without the 30-day waiting period specified in § 8(a)(3). The court remarked (p. 912): "We recognize also that requiring reimbursement by the union is less oppressive than demanding it of the employer, since the union has at least received the dues—although it has also rendered the services for which the dues were paid. However, there is not a syllable of evidence that in this case the omission of the 30-day clause in fact had any coercive effect". It is apparent that the union had represented a majority of the employees for many years.

Morrison-Knudsen Company v. *N. L. R. B.*, 275 F. 2d 914 (2d Cir. 1960).

This case was decided the same day as *Building Material Teamsters, supra.* Only employers were involved here. The court affirmed the Board's holding that the employers violated §§ 8(a)(3) and (1) of the Act by maintaining an exclusive hiring hall arrangement with a union under which non-members of the local were discriminated against by giving preference to members. The reimbursement of dues remedy was denied enforcement because it was "unduly harsh and penal in nature". The court also observed that it was unfair to require the employer, who had at most received only indirect benefit from the practice, to pay back all of the dues, etc., collected by the union local (dues were not checked off but were collected by the job steward), while at the same time the union, which was "the primary beneficiary of the unlawful conduct and undeniably the most culpable" was permitted to retain the funds unlawfully exacted by it.

N. L. R. B. v. *American Dredging Company*, 276 F. 2d 286 (3d Cir. 1960).

Only the employer was subject to the remedy. There was no question about the employer's violation of §§ 8(a)(1), (2) and (3) of the Act, in that it gave illegal financial assistance to the union and maintained illegal closed shop hiring practices. The court held, however, that reimbursement of dues to union members would in no way effectuate the policies of the Act. No employee was shown to have joined the union to get his job; to the contrary, all jobs went to union members. Reimbursement of dues to the union members, who profited by the unlawful preference, was called a "windfall" to them and an "unjust penalty" to the employer.

Morrison-Knudsen Company v. *N. L. R. B.*, 276 F. 2d 63 (9th Cir. 1960).

The court enforced reimbursement of dues against an employer and the union as to five college students who were coerced into joining the union to get summer jobs, but it rejected the Board's broad reimbursement order as to all employees, saying (p. 76) that "reimbursing a lot of old-time union men could not be 'anything but a windfall to the employees and an unjust penalty to the employer' ". It held that the Board's broad order "is punitive, penal, non-remedial and an unauthorized requirement of payment to third persons not shown to have been in any manner damaged by the asserted unfair labor practice".

N. L. R. B. v. *Local 176, United Brother. of Carpenters, etc.*, 276 F. 2d 583 (1st Cir. 1960).

The court refused enforcement of the Board's "Brown-Olds" remedy against the union. The violation there was the "tacit" agreement that all employees would have to obtain job clearance from the union and the failure to meet *Mountain Pacific* standards. The court refused to enforce the order requiring "disgorgement" of dues on the basis that the violation of the Act was not a conscious one by the respondent because the conduct was recognized as unlawful only after it had occurred and the Board had adopted its *Mountain Pacific* doctrine. In those circumstances, the court said (p. 586) that "a disgorgement order would seem to us to be an *ex post facto* penalty".

N. L. R. B. v. *Millwrights' Local 2232, District Council, etc.*, 277 F. 2d 217 (5th Cir. 1960).

The reimbursement order was directed only against unions. It appeared that the employer had unlawfully dele-

gated control over hiring to the union and that two men were refused employment because they did not have union clearance. Enforcement of the remedy was refused on the ground that there was nothing to indicate that any member paid dues to the union because it was necessary to obtain or retain employment or that union members would not remain members if the hiring hall was not used. The court said (p. 222):

> "In the absence of some proof that the dues and assessments would not have been paid except as a requirement for obtaining employment, we think the order of restoration intended as a compensatory remedy results instead in a windfall to the employees and an unjust penalty to the Union."

Lakeland Bus Lines, Inc. v. *N. L. R. B.*, 278 F. 2d 888 (3d Cir. 1960).

Both the union and the employer were subject to the reimbursement remedy. The charging party, who had been a union member, was suspended by the union because he took a grievance directly to management. Upon suspension from the union, the employer discharged him because he was not in good standing with the union. As a result of the case, the Board discovered that the union shop clause in the contract failed to include the required 30-day waiting period. Although the court sustained the findings of discrimination and illegality of the contract, it denied enforcement of the Brown-Olds remedy, saying (p. 892): "There is no showing in this case that any employees were coerced into joining or remaining in the union. There is no proof that the union was company-sponsored or dominated."

N. L. R. B. v. *United States Steel Corp.*, 278 F. 2d 896 (3d Cir. 1960).

Both the employer and the union were charged. The court found there was enough support for the finding of violation of §§ 8(a) (1) and (3) and 8(b) (1) (A) and (2) of the Act in that union men who did the hiring preferred union men and discriminated against a man because he was not in the good graces of the union. The court rejected the Board's "inevitable coercion" doctrine and found that there was no evidence that any employee was coerced into joining the union. The court reserved the question as to whether the remedy could ever be enforced against an employer. As to the union, it said that (p. 900) "to order a union to reimburse dues which it would have collected even if it had not committed an unfair labor practice appears to be nothing more than a fine" and held that the Board did not have the power to impose penalties to deter violations of the Act. The court also criticized the broadness of the Board's order, calling it a "shotgun blast, and not related to any aspect of this case".

N. L. R. B. v. *Halben Chemical Co.*, 279 F. 2d 189 (2d Cir. 1960).

Only the employer was involved here. The employer, during a strike, recognized a union that apparently represented a majority of its employees, but at a time when decertification of another union was still pending. The court refused to enforce an order requiring reimbursement of dues not checked off but paid voluntarily and directly by the employees to the union, saying (p. 192):

> "Here, as in Morrison-Knudsen, *supra*, where we excised a reimbursement order in a discrimination case, the remedy is imposed solely against the employer, although the funds are, or at least were, in

the hands of the union. On the other hand, as in N. L. R. B. v. Revere Art Metal Co., supra, where we upheld the reimbursement remedy, this case deals with a union claimed to have been unlawfully assisted by the employer. However, in Revere the employer did not contest the order and our opinion recognized that cases might arise where imposition of the remedy would be arbitrary even when the unfair labor practice was allegedly unlawful assistance to a union or an unlawful union security agreement. This is such a case.

. . "There is no evidence of coercion of respondent's employees. * * * We consider that, on such a record, to require this employer to reimburse all its employees for sums paid directly by them to the union is 'oppressive and therefore not calculated to effectuate a policy of the Act'."

N. L. R. B. v. *Local Union No. 450; etc.*, 281 F. 2d 313 (5th Cir. 1960).

Only the union was involved. The court refused enforcement of the reimbursement of dues portion of the Board's order, commenting (p. 317):

"Undiscouraged by previous decisions of this Court and other Courts of Appeals, the Board again seeks enforcement of the Brown-Olds order imposing reimbursement of union dues more as a penalty than as a remedy for the union's unfair labor practices."

The evidence showed an exclusive union hiring hall arrangement whereby the master mechanic who did the hiring had to be a union man of three years' standing. There was also evidence of discrimination in that the union prevented the promotion of a qualified engineer to master mechanic because his three years' experience was not all as a union member.

N. L. R. B. v. *Operating Engineers, Local 382,* F. 2d , 46 LRRM 2544 (8th Cir. 1960).

The employer was not a party. The Board applied the remedy against the union because it had caused the employer to discriminate against an employee by discharging him and was party to an unlawful hiring arrangement. While the court found ample evidence to support the finding of violation, it refused to enforce the reimbursement order because there was no basis for finding that the dues were coercively collected by the union and there was no direct relationship shown between the receipt of the funds and the unlawful practice.

N. L. R. B. v. *Saltsman,* F. 2d , 47 LRRM 2002 (6th Cir. 1960), enforcing in part 123 NLRB 1176 (1959).

Only the employer was involved. The employer had contracts with the union for ten years, but there was no union shop clause, although union dues were checked off if authorized by the employees. The evidence established that a job superintendent at a construction project delegated to the shop steward his duty to have new employees execute income tax withholding forms and told employees to "get signed up" with the job steward. The job steward, with the knowledge of the superintendent, had the employee sign union membership and check-off cards in addition to withholding forms. The trial examiner found that the employer had encouraged union membership and unlawfully assisted the union in violation of 8(a)(3) of the Act, and ordered reimbursement to all employees at the project, except those who were members before going to the project. The Board enlarged the order to include all employees at the project, regardless of when they joined, on the basis of its doctrine that all employees are "inevitably coerced * * * to become

or remain members", by such unlawful practice. The court refused enforcement of the refund order as to the employees who were members before going to the project.

N. L. R. B. v. *Local 1566, ILA*, . . F. 2d , 46 LRRM 2073 (3d Cir. 1960).

The court refused to enforce the *Brown-Olds* remedy sought to be applied against the union. The unlawful practice involved preference of union members at a "shape up" hiring and discrimination against two men because of non-membership in the union. Also involved was a union security clause held unlawful because the union had not complied with the filing requirements of the Act. The court said (46 LRRM at 2077):

> "* * * we have continued to insist that the reimbursement order must be limited to employees shown to have been coerced. And we emphasize that in such alleged instances it is necessary to produce evidence of coercion as to each individual concerning whom it is asserted."

Perry Coal Co. v. *N. L. R. B.*, F. 2d 47 LRRM 2208 (7th Cir. 1960).

This case is discussed *supra*, pp. 27-8.

II

Cases Where Reimbursement of Dues Was Ordered

N. L. R. B. v. *Broderick Wood Products*, 261 F. 2d 548 (10th Cir. 1958).

This is the first case following *Brown-Olds* in which an employer was required to reimburse dues jointly and severally with the union. The employer checked off initiation fees and dues for the union under an unlawful union security clause and actually suspended and threatened employees with discharge if they failed to put themselves in good standing with the union within twenty-four hours.

Local Lodge No. 1424, Machinists v. *N. L. R. B.*, 264 F. 2d 575 (D. C. Cir. 1959), rev'd on other grounds, 362 U. S. 411.

The employer and the union were required to reimburse dues to employees required to join the union and authorize check-off of dues by an invalid union security clause. The union did not represent a majority of the employees, but the employer agreed to the union shop clause and the check-off without first determining whether the union represented a majority of the employees. Thus, the action of the employer and the union did actually coerce the employees whose dues were ordered reimbursed.

N. L. R. B. v. *General Drivers, etc., Local 886*, 264 F. 2d 21 (10th Cir. 1959).

Reimbursement of dues was ordered against the union only. The employer was not a party to the proceedings. There the union refused to execute the contract so as to give effect to a wage increase until 80% of the employees joined the union and authorized the check-off of dues. If that evidence did not constitute proof of actual coercion, at least it is a reasonable inference that the employees did not all join voluntarily. The court enforced the Board's order because it could not say from the whole record that the remedy was "oppressive and therefore not calculated to effectuate a policy of the Act" (264 F. 2d at 23).

Dixie Bedding Manufacturing Co. v. *N. L. R. B.*, 268 F. 2d 901 (5th Cir. 1959).

Only the employer was involved. This was another case where the employer recognized a union that did not represent a majority of its employees. The employer entered into a five-year contract that provided for a small wage increase and contained union security and check-off provisions. The

court said (p. 907): "We agree that there must be some showing of coercion of the employees * * * ", but found that the unlawful union security clause "was in and of itself sufficient coercion to justify the issuance of the reimbursement order".

N. L. R. B. v. *Local 60, United Bro. of Carpenters, etc.*, 273 F. 2d 699 (7th Cir. 1960), No. 68 this Term.

The employer was not a party to the proceeding before the Board and was not subjected to the reimbursement order. There was proof that two qualified applicants for work, who were acceptable to the employer, could not get union clearance and did not get work. It also appeared that all who were hired had been referred by the union. The court found that such record supported the Board's finding that the dues and fees were coerced "in that there was present an implicit threat of loss of job if those fees were not paid" (p. 703). The court obviously considered that there was sufficient proof of actual coercion.

N. L. R. B. v. *Local 111, United Bro. of Carpenters*, 278 F. 2d 823 (1st Cir. 1960).

No employer was involved. An unusual aspect of the case was that the union appeared before the Board without counsel and filed no exceptions to the Trial Examiner's report. The court concluded that the Board's order was not entitled to "full scrutiny" because of the default, but should be enforced "if it is not unreasonable on its face, and has some semblance of support". The court noted that it had disapproved a "disgorgement order" in a prior case, but had not ruled "that the Board could never determine such relief to be proper". The violation of the Act was more than a failure to comply with the Board's *Mountain Pacific* standards, since there was evidence that the charging parties were

actually discriminated against and deprived of a job opportunity because they were not members of Local 111.

N. L. R. B. v. *Local 294, Internat'l Bro. of Teamsters, etc.*, 279 F. 2d 83 (2d Cir. 1960).

The court, upon rehearing, enforced the reimbursement of dues remedy against a minority union recognized by the employer, on the ground that a majority of the employees were coerced by the illegal agreement and that coercion was "traceable to the union". The employer was not a party to the proceedings.

N. L. R. B. v. *Revere Metal Art Co.*, 280 F. 2d 96 (2d Cir. 1960).

Both the union and the employer were required to reimburse dues to the employees, but the employer did not oppose enforcement of the order. This case also involved recognition of a union that did not represent a majority of the employees and the execution of an agreement providing for a union shop and the check off of dues. The employer was satisfied merely by a "shuffle" of union cards "flipped" in his presence by the union organizer. There was no question but that a majority of the employees were coerced into paying dues to the union. The court distinguished two prior cases where it had refused enforcement of a reimbursement of dues remedy on the ground that those cases involved §§ 8(a)(3) and 8(b)(2) and unquestioned majority unions, whereas the instant cases involved §§ 8(a)(1) and (2) and 8(b)(1)(A) of the Act and a minority union.

Paul M. O'Neill Inter. Detective Agency, Inc. v. *N. L. R. B.*, 280 F. 2d 936 (3d Cir. 1960).

Only the employer was a party to the proceeding. The court sustained reimbursement of dues as a remedy on the

ground that the employer required its employees, "as a condition of continued employment, to join a union the organization of which had been illegally assisted" by the employer. It also appeared that the employer had checked off the dues to the assisted union. The court distinguished the four other cases in which it had theretofore refused to enforce reimbursement orders on the ground that in none of those cases was the union company-assisted.

N. L. R. B. v. *Wells*, 283 F. 2d 689 (6th Cir. 1960).

The court enforced an order against an employer that was found to have encouraged membership in the union (not a party to the proceeding). The order included reimbursement of dues paid to the union during the course of a project. There was no discussion of the facts and circumstances that prompted the court to approve the remedy. Before the Board, 45 LRRM 1423, the employer had filed no exceptions to the trial examiner's report which found that he had required all employees to maintain union membership and to authorize the check off of dues as a condition of employment.

Petitions for certiorari are now pending in the following seven of the above cases:

N. L. R. B. v. *Local Union No. 85, Sheet Metal Wkrs'. Int. Assn.*, No. 89 (*supra*, p. 1a);

Morrison-Knudsen Company v. *N. L. R. B.*, No. 120 (*supra*, p. 3a);

N. L. R. B. v. *American Dredging Company*, No. 123 (*supra*, p. 3a);

N. L. R. B. v. *Millwrights' Local 2232, District Council, etc.*, No. 229 (*supra*, p. 4a);

N. L. R. B. v. *United States Steel Corp.*, No. 5, 228, 311 (*supra*, p. 6a);

N. L. R. B. v. *Local Union No. 450, etc.*, No. 467 (*supra*, p. 7a);

N. L. R. B. v. *Local 1566, ILA*, No. 285 (*supra*, p. 9a).